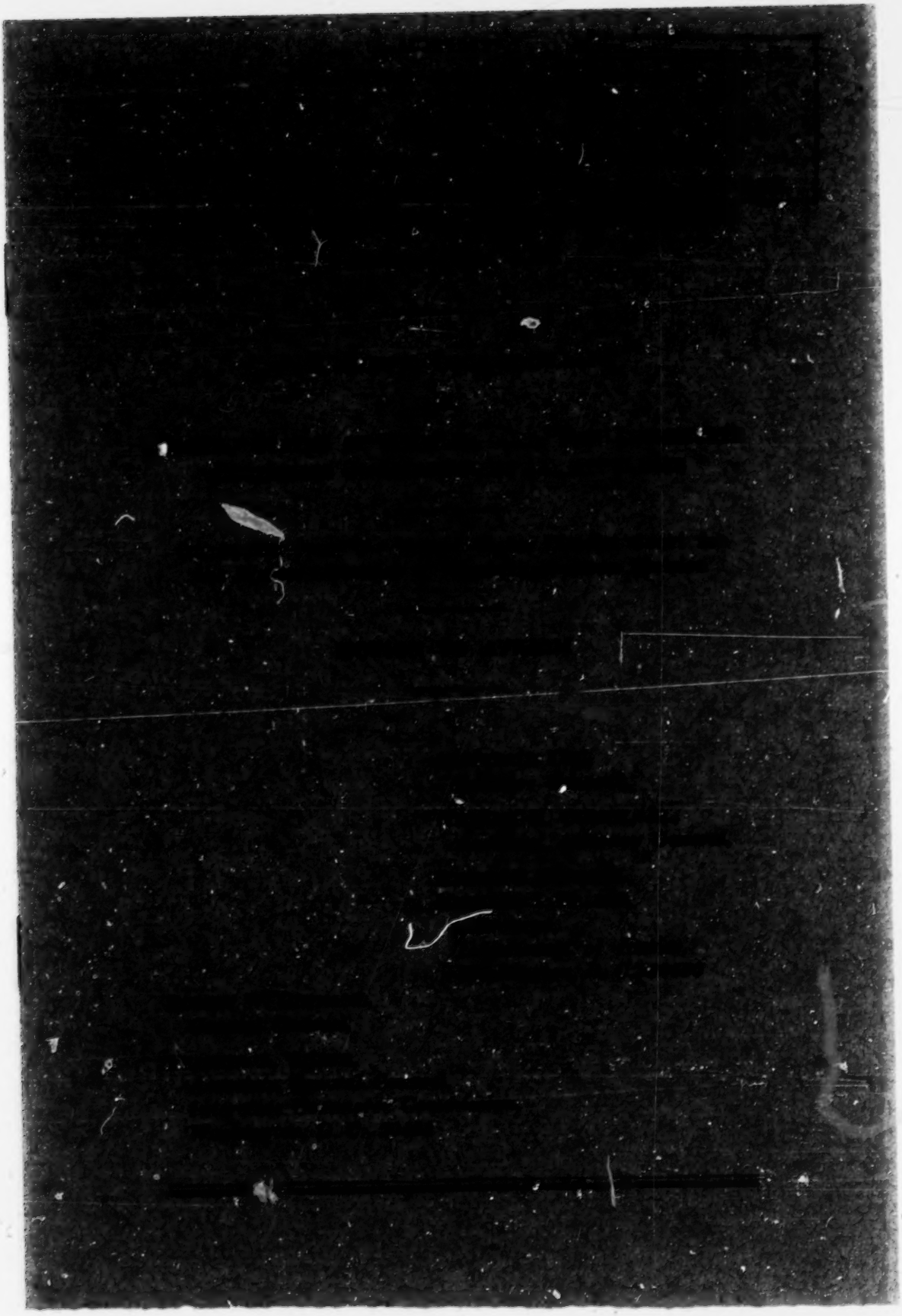

# In the Supreme Court of the United States

OCTOBER TERM, 1963

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No. 726

J. B. ACTON, INC., APPELLANT

*v.*

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, ET AL., APPELLEES

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**On Appeal from the United States District Court for the Western District of Missouri, Western Division**

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## MOTION TO AFFIRM

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Pursuant to paragraph 1(c) of Rule 16 of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

### STATEMENT

This is a direct appeal from a final judgment of a three-judge district court convened pursuant to 28 U.S.C. 2282 and 2325. The judgment affirmed a report and order of the Interstate Commerce Commis-

sion directing the appellant to cease and desist from conducting certain motor carrier operations found to be unauthorized by its common carrier certificate, and denied appellant's applications for interlocutory and permanent injunctions. (J. St. 1a-2a).

Appellant holds a certificate of public convenience and necessity authorizing it to transport "*Oil-field equipment, machinery,* and *materials*" between points in Kansas and five other States (J. St. 3a). In 1960, the Commission instituted an investigation under Sections 204(c) and 212(a) of the Interstate Commerce Act, 49 U.S.C. 304(c) and 312(a), to determine whether appellant was transporting certain commodities not authorized by its certificate, in violation of Section 206(a) of the Act, 49 U.S.C. 306(a). After full administrative proceedings (described in the district court opinion, J. St. 3a-5a), the Commission held that the authority in appellant's certificate to transport "*oil-field equipment, machinery,* and *materials*" does not cover machinery and materials generally (which appellant was transporting).

The Commission interpreted the certificate to authorize transportation (1) of oilfield equipment, (2) of oilfield machinery, and (3) of oilfield materials, and ruled that such authority is limited to such equipment, machinery, and materials, as are either commonly limited in their use to the oilfield industry or are clearly identifiable as being intended for use by the oilfield industry (J. St. 18a). It rejected appellant's contention that the word "oil-field" contained in its certificate modifies only "equipment," and not "machinery" or "mate-

rials". It pointed out (J. St. 14a-15a) that the term "materials" is roughly equivalent to "general commodities"; that, whenever the Commission has authorized the transportation of "general commodities", it has used the latter phrase; and that as a commodity description "materials" would be virtually unprecedented. The Commission concluded that appellant's certificate is unambiguous and that, therefore, it was unnecessary to look to the records in the underlying "grandfather" proceedings to ascertain what the Commission intended to grant. It noted also that the appellant did not contend that the Commission's records would support a conclusion contrary to that reached in the proceeding before it (J. St. 17a).

The district court unanimously held that the Commission's interpretation was a permissible one (J. St. 8a). The court observed that if the appellant should prevail, "then under the general class of machinery and materials (which in the unlimited sense covers nearly everything) plaintiff could usurp the right to transport practically all material things of every nature in the territory covered by its certificate to the impairment of every permit heretofore granted in said territory" (J. St. 8a). It concluded that "there was a rational factual and legal basis for the Commission's order; that the order is not clearly erroneous, nor capricious, arbitrary or the result of any abuse of discretion on the part of the Commission; that there is a substantial basis for the order" (J. St. 9a).

## ARGUMENT

This appeal presents no substantial question warranting plenary review by this Court. It involves only the meaning of a commodity description in a certificate of public convenience and necessity, and the district court correctly upheld the Commission's interpretation of its own certificate.

1. The interpretation of a certificate issued by the Commission is primarily a question for that agency (see *Service Storage & Transfer Co.* v. *Virginia*, 359 U.S. 171), and its interpretation "is controlling on the courts unless clearly erroneous," *Andrew G. Nelson Inc.* v. *United States*, 355 U.S. 554, 558. *Simpson* v. *United States*, 200 F. Supp. 372 (S.D. Iowa), affirmed, 369 U.S. 526. In the present case, the district court correctly upheld the Commission's interpretation on the ground that it had a "rational factual and legal basis", was not "clearly erroneous", and was not "capricious, arbitrary or the result of any abuse of discretion on the part of the Commission" (J. St. 9a).

2. Appellant's principal contention is that the certificated commodity description is clear, concise, and unambiguous and that the meaning of it was established through the uncontradicted testimony of appellant's two expert witnesses, two associate professors of English (J. St. 8-9). These witnesses based their interpretations of the commodity description upon the rule of grammatical construction which holds that an adjective modifying the first noun of a series does not modify the other nouns of the series.

These witnesses were not familiar with the transportation industry and accordingly they did not take into account such factors as "trade usage" and "common understanding" in the industry (J. St. 14a). The Commission observed that these witnesses, while experts in their field, "were unfamiliar with regulated motor carriage and thus unaware of the absurdity, in transportation terms, of attempting to interpret the respondent's certificate solely from an academician's point of view" (J. St. 16a). The district court correctly held that these opinions "were not binding on the Commission." *Simpson* v. *United States*, *supra*; *Ace Lines, Inc.* v. *United States*, 197 F. Supp. 591, 596 (S.D. Iowa).

3. Appellant also argues that if the terminology of the certificate is ambiguous, it should not be required to justify the broad construction for which it contends by proving the scope of its grandfather operations. If, however, the authority granted does not accurately reflect the carrier's grandfather operations, it is incumbent upon the carrier to re-open the grandfather proceedings; it may in no event collaterally attack the scope of the grandfather certificate in an investigative proceeding of this kind. *Nelson, Inc.* v. *United States*, 355 U.S. 554, 561-562.

## CONCLUSION

The decision below is clearly correct and this appeal presents no substantial question. The judgment of the district court should accordingly be affirmed.

Respectfully submitted.

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FEBRUARY, 1964.

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